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No. 80-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAWRENCE M. ROSENTHAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this petitioner was effectively denied the right to appeal his federal criminal conviction by the failure of the Court of Appeals to review the principal issues of federal substantive law presented in his appeal.

2. Whether importation is a necessary element of the conspiracy offense proscribed by Section 963, Title 21, United States Code.

3. Whether there was a fatal variance between the conspiracy charged and the proof adduced at trial against this petitioner where the Government's evidence purporting to connect the petitioner with the conspiracy actually charged was found by the jury and later conceded by the Government on appeal to have been wholly refuted and the remaining evidence upon which the conviction necessarily was based involved a manifestly different (and uncharged) conspiracy.

4. Whether the erroneous admission in evidence against the petitioner of a post-conspiracy, post-arrest "statement" (the listing of Petitioner's name and business address in an address book) of an indicted coconspirator who was a fugitive at the time of trial was so prejudicial as to require reversal of the petitioner's conviction.

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No.

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OCTOBER TERM, 1980

LAWRENCE M. ROSENTHAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Lawrence M. Rosenthal respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals affirming the petitioner's conviction is unreported and appears in the Appendix hereto (App. A, p. A-1 - A-5). The Order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* likewise is unreported and appears in the Appendix hereto (App. B, p. A-6).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 17, 1980. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 22, 1980, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28;

§43 Creation and composition of courts

(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.

§1291 Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States..., except where a direct review may be had in the Supreme Court.

United States Code, Title 21:

§963 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

§952(a) Importation of controlled substances

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United

States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter....

Rule 14, Federal Rules of Criminal Procedure

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 802, Federal Rules of Evidence

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 801, Federal Rules of Evidence

Definitions

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d)(2)(E) *Statements which are not hearsay.* A statement is not hearsay if... (2) *Admission by party-opponent.* The statement is offered against a party and is... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

This petitioner was effectively denied his federal right of appeal inasmuch as the issues of federal substantive law on which he sought review were not decided in the Court of Appeals' *per curiam* opinion. They were not decided because of oversight and because the Court mistakenly confused Petitioner's claims with those in another appeal with which his was consolidated. This denial of the petitioner's right of appeal arose out of the following context.

Petitioner was indicted on October 10, 1978 in the United States District Court for the District of South Carolina on one count of conspiracy to import marijuana into the customs territory of the United States (21 U.S.C. §963)[1] and one substantive importation count (21 U.S.C. §952(a)) which occurred on December 30, 1977, and in the course of that conspiracy.[2]

Petitioner appealed his conviction on the conspiracy count to the United States Court of Appeals for the Fourth Circuit and his appeal was consolidated *sua sponte* with that of a codefendant (Alan Arruda) who had been convicted on both counts.

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[1]The conspiracy was alleged to have begun in September, 1977, and continued until the date of the indictment, with importations occurring on September 30, 1977, and December 30, 1977, and an attempted importation on December 14, 1977. In all, six alleged conspirators were indicted and three others were named as unindicted coconspirators; but two defendants were fugitives at the time of trial and thus four were tried.

[2]This substantive count was submitted to the jury, as to the Petitioner, exclusively under the doctrine of *Pinkerton* v. *United States,* 328 U.S. 640 (1946). He was acquitted on the substantive count, but convicted on the conspiracy count.

On appeal, the petitioner presented three principal arguments for review:

> 1. Importation is a necessary element of the offense proscribed by 21 U.S.C. §963 and the Government failed to prove that element as to the petitioner;[3]
>
> 2. The fatal variance between the single conspiracy charged and the multiple conspiracies shown by the proof, particularly in light of Petitioner Rosenthal's acquittal on the substantive count under *Pinkerton,* required reversal for the trial court's failure to grant him a severance;
>
> 3. Given the tenuous link shown by the proof between Petitioner and the conspiracy charged, the erroneous admission in evidence of a post-conspiracy hearsay declaration of an unavailable conspirator was so prejudicial as to the petitioner that reversal of his conviction was required.

Codefendant Arruda likewise made the hearsay argument, but was unable, by virtue of the evidence,[4] to make the other two arguments, and he was forced to resort to a general sufficiency of evidence argument, claiming the uncorroborated testimony of the Government informer was insufficient to support his convictions.

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[3]Although the petitioner was named in only three of the 21 Overt Acts, the Government's proof against Petitioner on two (alleged meetings with certain coconspirators in December, 1977) of these was indisputably disproven and, thus, the case against Mr. Rosenthal turned on a single conversation among Petitioner, Arruda and a Government informer on February 3, 1978, the context of which was hotly disputed but in which importation was not mentioned in either version.

[4]The Government's evidence, as credited by the jury, showed Mr. Arruda was a participant in virtually every conspiratorial action and every Overt Act.

At oral argument before the Court of Appeals, the government conceded its proof (which consisted of the informer's testimony) that Petitioner had participated in the charged conspiracy in December, 1977, was clearly disproved by overwhelming evidence, but the Government did maintain that telephone toll records were some evidence of Mr. Rosenthal's involvement in December, 1977 (although these records did not, and could not, identify the parties to the calls, the contents of any conversations, or indeed, whether there was a conversation.)

Notwithstanding the petitioner's arguments and the vast disparity between the contentions of the two appellants, the Court of Appeals' decision affirming the petitioner's conviction completely ignored the issue of whether importation is an element of the offense under 21 U.S.C. §963 and, by treating his argument as identical to that of Appellant Arruda, failed to decide whether there was proof of importation as to this petitioner.

The variance issue, unlike the importation issue, was decided by the Court of Appeals, albeit in a one sentence conclusion that it was unfounded. But the Court of Appeals likewise treated the petitioner's appeal as identical to Mr. Arruda's and combined them, ignoring the Government's critical concession and the jury verdict on the substantive count, as well as its own decision in *United States* v. *Vaught,* 485 F.2d 320 (4th Cir. 1973), *cert. denied,* 415 U.S. 924 (1974). Thus, there was no apparent meaningful review of that issue and it is impossible to tell what standards the Court of Appeals applied.

Finally, the Court ruled that the post-conspiracy declaration of an unavailable coconspirator, *i.e.,* the entry (at an unknown time) of Petitioner's name and address in an address book seized months after the indictment, was not hearsay but "...circumstantial evidence as to the possible relationship between various members of the conspiracy...." (App. A, p. A-3).

Accordingly, the petitioner timely filed a Petition For Rehearing pursuant to Rule 40, Federal Rules of Appellate Procedure, and a suggestion for rehearing *en banc* pursuant to Rule 35 of those Rules. This Petition urged the Court to reconsider and rehear its decision on the grounds that the Court had failed to decide the first main issue presented to the Court (the importation issue), had failed to provide a meaningful review of the second issue (the variance issue), and had erroneously decided the third issue (the hearsay issue). The petition was denied, without elaboration, by Order entered October 22, 1980.

REASONS FOR GRANTING THE PETITION

This case presents an important issue of first impression which involves the scope and substance of the right to appeal in federal criminal cases, a right recognized by this Court in *Coppedge* v. *United States,* 369 U.S. 438, 441 (1962) and *Hardy* v. *United States,* 375 U.S. 277, 278 (1964); for this petitioner contends he was effectively denied that right by virtue of the Court of Appeals' failure either to decide or meaningfully review the issues of substantive federal law presented in his appeal. Moreover, the inquiry implicates the Due Process Clause of the Fifth Amendment, although Petitioner recognizes that the Court has said, in *United States* v. *MacCollom,* 426 U.S. 317, 323 (1976), and *Abney* v. *United States,* 431 U.S. 651, 656 (1977), that there is no constitutional right to an appeal.

It likewise presents the important question, of first impression in the criminal context, of whether the case should be remanded with instructions because it is impossible to tell whether the Court of Appeals decided substantial federal questions and, if so, applied the proper standards.

Second, this case presents the important and recurring question of whether importation is an element of the conspiracy offense proscribed by 21 U.S.C. §963, as distinguished from the conspiracy offense under 21 U.S.C. §846, an issue which this Court has not decided. Moreover, the Court of Appeals' failure to decide this issue and its affirmance of this petitioner's conviction, in effect, places its decision in conflict with the decisions of this Court under the former statutes and with the decisions in other circuits; and it constitutes such a departure from the plain language of the applicable statutes that exercise of this Court's supervisory jurisdiction is warranted.

Third, this case presents important and recurring questions of federal conspiracy law with respect to variance and prejudice that have not been addressed by this Court in over 30 years and should be revisited.

Finally, this case presents the important issue, under the Federal Rules of Evidence, of the admissibility of the post-conspiracy declaration allegedly written by an unavailable co-conspirator, the Court of Appeals resolution of which apparently is in conflict with this Court's decisions in *Krulewitch* v. *United States,* 336 U.S. 440 (1949) and *Pointer* v. *Texas,* 380 U.S. 400 (1965).

1. This Court has expressly recognized that an appeal in a federal criminal case is "a matter of right" under the federal statutes and rules. *Coppedge* v. *United States,* 369 U.S. 438, 447 (1962); *Hardy* v. *United States,* 375 U.S. 277, 278 (1964); *Rodriquez* v. *United States,* 395 U.S. 327, 329-30 (1969). Although the Court has safeguarded that right in terms of an indigent appellant's access to the federal courts of appeal (See: *Coppedge* v. *United States, supra)* and the ability to fully and effectively present his or her case to the appellate court (*Hardy* v. *United States, supra; Johnson* v. *United States,* 352 U.S. 565 (1957); *Ellis* v. *United States,* 356 U.S. 674 (1958)) it has never explicated or specifically addressed the substance of the right to appeal, *i.e.,* what review is required. The instant case squarely presents that issue.

This case, therefore, does not involve a denial of access to the Court of Appeals by reason of indigency; Petitioner is not indigent and his appeal was duly filed, docketed, and heard. It does not involve any inability to diligently investigate possible grounds of appeal or lack of legal representation on appeal; Petitioner obtained the four volume trial transcript and was represented by retained counsel before the United States Court of Appeals for the Fourth Circuit. It does not even involve the denial of the opportunity to fully brief the appeal and be heard in oral argument before the Court of Appeals; this case was not summarily affirmed before argument pursuant to Local Rule 7 of the United States Court of Appeals for the Fourth Circuit. *See: Taylor* v. *McKeithen,* 407 U.S. 191, 195, n.4 (1972); *Lego* v. *Twomey,* 404 U.S. 477, 480 n.6 (1972). Thus, the issue

presented here is whether this petitioner, while afforded a full review by the Court of Appeals in form, was effectively denied the right to appellate review in substance. He asserts that he was denied that right because the Per Curiam Opinion of the Court of Appeals affirming his conspiracy conviction demonstrates that he was not afforded a meaningful review by that Court.

The factual predicate for Petitioner's claim is founded upon a comparison of the issues presented and argued to the Court of Appeals and the Opinion itself.

As noted *supra,* the lead argument made by the petitioner in the Court of Appeals was that the proof against him failed to establish that the conspiracy the jury found he had joined on February 3, 1978, was an *importation* conspiracy, as required under 21 U.S.C. §963, or that he knew it was an importation conspiracy and intended to join such a conspiracy.[5]

The cornerstone of this argument, of course, was (and is) the proposition that a conspiracy charged under 21 U.S.C. §963 requires proof that importation was the object of that conspiracy (see Part 2 *infra*) and the petitioner's argument stood or fell on the resolution of that issue. The Court of Appeals' Opinion does not mention, much less decide, that critical issue.

Having ignored the threshold issue, the Court then proceeded to overlook the remaining evidentiary issues, *i.e.,* proof, *vel non,* of Petitioner's knowledge of importation and intent with respect thereto, by treating the petitioner's argument as identical to the sufficiency of evidence argument advanced by the other appellant, Alan Arruda. Indeed, the Opinion clearly reflects this misconception by the Court of Appeals.

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[5] It was also argued that the evidence was insufficient to show that he actually joined any conspiracy, but this claim rested on a basis other than statutory construction.

> *Appellants'* next contention is that the uncorroborated testimony of Herman Hernandez, an unindicted coconspirator, was so inconsistent and unsubstantial that the remaining circumstantial evidence cannot sustain the conviction. (App. A, p. A-3) (Emphasis added.)

And equally clear is the fact that this was a misconception. First, this petitioner made no such argument and expressly informed the Court, in his Reply Brief, that he was not making that argument.[6] Second, the quantity of the evidence against Appellant Arruda, as compared with that against Petitioner, made it factually, legally, and logically impossible to consider these arguments as even remotely similar. For example, the proof against Appellant Arruda absolutely foreclosed an argument by him that importation was not involved in the conspiratorial acts to which he was directly connected by the Government's evidence, i.e., the importation flights of September 30 and December 30, 1977, and the aborted flight in early December, 1977; whereas the jury necessarily found (under the *Pinkerton* instruction) that Petitioner joined no conspiracy before February 3, 1978, and the Government conceded that its proof purporting to connect Petitioner to the December, 1977, flights was absolutely refuted.

In short, the Court of Appeals inadvertantly confused two disparate arguments and the ultimate result of this inadvertance was that there was no apparent reivew, certainly no meaningful review, of literally half of this Petitioner's appeal.

The other argument presented by the petitioner to the Court of Appeals suffered a similar fate, for it too became submerged in the other appellant's argument. Although both appellants contended that there was a variance between the single con-

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[6] The Government had made the same mistake of lumping these two different arguments together in its brief on appeal, thus prompting the need to so inform the Court.

spiracy charged in the indictment and the multiple conspiracies shown by the evidence adduced at trial, any similarity between the respective arguments ended with the statement of the proposition itself. Viewed in the light most favorable to the Government, the evidence tended to prove that if there was more than one conspiracy (and we submit there was), Appellant Arruda was connected to all of them, whereas the proof against the petitioner was restricted to a single witness's version of one meeting on February 3, 1978, in which Petitioner was said to have joined a conspiracy by tendering a check to Alan Arruda to finance "another marijuana flight." (This meeting, of course, occurred over a month after the last importation charged in the indictment and, furthermore, there was no proof or charge of a subsequent flight, importation or otherwise.)

Clearly then, to treat the issues raised by the two appellants in their respective variance arguments as identical was to completely ignore the substantial issues raised by the petitioner. This is precisely the treatment Petitioner received, however, in the Opinion of the Court of Appeals, as it not only dealt with the different issues as one, it gave that one issue short shrift.[7]

> The appellants also claim that a fatal variance existed between the charge in the indictment and the proof adduced at trial. Counsel argues that while only one conspiracy was alleged in the indictment, the evidence at trial actually showed three or four unrelated conspiracies rather than an overall plan to import marijuana into the United States. A review of the record and briefs of counsel indicates that this assertion is unfounded.

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[7] A third issue raised by Petitioner, as part of the variance - prejudice argument, was in fact considered and decided by the Court of Appeals. That was the hearsay issue regarding the address book and, with respect to that issue, Petitioner concedes he was afforded appellate review, although he respectfully submits the Court of Appeals erred in its disposition of that issue (See Part 3 *infra*).

Accordingly, the ultimate effect of the Court of Appeals' treatment of the foregoing issues and arguments was that there was no meaningful review of the petitioner's case on appeal. In terms of substance, he had no review at all of important and substantial questions of federal law.

It follows, then, that the petitioner's federal right to appeal has effectively been denied, although he has gone through the procedure of an appeal. The applicable federal statutes and rules which provide for appeals in criminal cases, as well as the decisions of the Court preserving the procedural protections attendant to an appeal and guaranteeing a meaningful presentation of an appeal to the courts, necessarily imply that an appellant has a substantive right to review by the Court of Appeals. What that substantive right entails or what quality of review is required, however, is not contained in such statutes and rules and has never been addressed by this Court. As a practical matter, this is the only Court that can address these important issues and it should do so in this case; for whatever the right to appeal requires in substance, it must at least insure that an appellant's non-frivolous claims are recognized, given some consideration, and decided, and that the opinion of the Court of Appeals provided some manifestation of these undertakings. These minimal requirements were not met in the petitioner's case below.

In the alternative, Petitioner respectfully submits that, *in lieu* of a consideration by this Court of the issues upon which review was originally sought in the Court of Appeals, this case should be remanded to the United States Court of Appeals for the Fourth Circuit with an instruction that the Court of Appeals address the issues it failed to consider in its *per curiam* opinion and any other instructions the Court deems proper under the circumstances. Inasmuch as the opinion of the Court of Appeals does not fully inform this Court as to whether it decided substantial federal questions as to this petitioner and, if so,

whether the proper standards were applied, such a remand is appropriate under this Court's decisions in *Taylor* v. *McKeithen, supra,* 407 U.S. 191, and *Northcross* v. *Board of Education,* 412 U.S. 427 (1973).

2. **Importation**

The issue of whether importation is an element of the conspiracy offense proscribed by 21 U.S.C. §963 has not been decided by this Court and, given the number of prosecutions under that statute, it is a recurring and important issue.

To the extent that the Court of Appeals failed to address the importation issue on this record,[8] its decision must be interpreted as a ruling that importation is not an essential element of that offense.[9] To that extent, therefore the decision of the Court of Appeals is in conflict with the express language of Chapter 13, Title 21, United States Code, the decisions of this Court under the predecessor statutes, and the decisions of other courts of appeals which have reached this issue.

Chapter 13 of Title 21, United States Code is divided into two Subchapters. Each has a conspiracy provision (Sections 846 and 963, respectively); each specifically refers to offenses defined in that subchapter; and each has identical language. The point of

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[8] As noted, Petitioner's conviction was necessarily based on the testimony of one witness as to his version of a conversation among Petitioner, Alan Arruda, and the witness on February 3, 1978. Viewed in the light most favorable to the Government, that version nevertheless contained no proof that the object of such conspiracy was importation of marijuana. The remaining proof upon which the Government and the Court of Appeals relied, *i.e.* telephone toll records and the address book, of course contained no shred of evidence remotely bearing on this issue.

[9] It should be noted that the Government did take the position on appeal that importation or knowledge thereof were not essential elements of the Section 963 offense.

distinction between Section 846 and Section 963 is that Subchapter II pertains to import and export offenses and Subchapter I does not. Thus, under the statutory framework, importation is not only an element of Section 963, it is the distinguishing element. Moreover, the object offense charged in the instant indictment (Sections 952(a), 960(a)) expressly provide that it is importation of controlled substances which is prohibited. The statutes themselves, therefore, unambiguously require that importation be an object of the conspiracy offense defined in 21 U.S.C. §963.

In *Leary* v. *United States,* 395 U.S. 6 (1969) and *Turner* v. *United States,* 396 U.S. 398 (1970), this Court dealt with statutory presumptions of knowledge of importation contained in 21 U.S.C. §§ 174, 176(a) and 4704(a), finding such presumptions constitutionally invalid as to marijuana and cocaine, but valid as to heroin. A part of the *ratio decendendi* in these cases was that these importation offenses required proof of importation and knowledge thereof. See: *Turner* v. *United States, supra,* 396 U.S. at 405. The resulting amendments to Title 21 did nothing to remove these requirements (See: 21 U.S.C. §960) and it is respectfully submitted that, with respect to these requirements, *Leary* and *Turner* apply with equal force to the amended statutes, specifically Sections 960 and 963 of Title 21.

Finally, the other circuits which have addressed the importation issue, including the Fourth Circuit, have reached the same result (under both the former and present statutes). *See, Villarreal Corro* v. *United States,* 516 F.2d 137 (1st Cir. 1975); *United States* v. *Nathan,* 476 F.2d 456, 459 (2d Cir. 1973); *United States* v. *Fisher,* 484 F.2d 868 (4th Cir. 1973); *United States* v. *Maslanka,* 501 F.2d 208 (5th Cir. 1974), *cert. denied,* 421 U.S. 912 (1975); *Jefferson* v. *United States,* 340 F.2d 193 (9th Cir.), *cert. denied,* 381 U.S. 928 (1965); *Mason* v. *United States,* 383 F.2d 107 (10th Cir. 1967), *cert. denied,* 400 U.S. 993 (1971).

Accordingly, it is respectfully submitted that the Court should decide this issue because of its important and recurring

nature. Moreover, the exercise of this Court's supervisory jurisdiction is warranted in this case because the decision below constitutes such a departure from the overwhelming weight of authority.

3. Variance and Prejudice

Over thirty (30) years ago, in *Kotteakos* v. *United States,* 328 U.S. 750 (1946) this Court dealt with the problems presented in federal conspiracy prosecutions where there was a variance between the charge of a single conspiracy and proof of multiple conspiracies at a single trial involving multiple defendants. Since *Kotteakos* and *Blumenthal* v. *United States,* 332 U.S. 539 (1947), the Court has not comprehensively addressed these important and recurring questions of variance and severance in the federal conspiracy context. In applying *Kotteakos* over the past thirty (30) years, the various Courts of Appeals have struggled through the tangled concepts of "wheels" and "spokes," "chains" and "links" in considering the variance arguments offerred by defendants in conspiracy cases. *See e.g. United States* v. *Elliott,* 571 F.2d 880, 900-902 (5th Cir. 1978) *cert. denied,* 439 U.S. 953 (1978). Because the task of making such determinations is so extremely complicated, and because the courts have repeatedly been called upon to undertake this task, the standards and principles announced in *Kotteakos* have become increasingly clouded, indeed submerged. The critical issue of variance, particularly when it exists in a conspiracy case with multiple defendants, should be clearly defined to avoid the prejudice which may result to uninvolved codefendants, such as the petitioner in this case. Yet, the state of the law in this area has become so increasingly confusing as to provide virtually no guidance to the trial courts constantly faced with the issue. It is respectfully suggested that this Court should now clarify the important principles announced in *Kotteakos* v. *United States, supra,* and that the case *sub judice* is appropriate for that undertaking.

In this case, petitioner was charged, in Count I of the indictment, with participating in an ongoing single conspiracy which

commenced in September, 1977 and allegedly terminated on October 10, 1978. The proof adduced at trial, however, showed three (3) separate and distinct conspiracies each with different members,[10] agreements and objects. The only evidence even remotely connecting the petitioner to any conspiracy proved rested solely[11] upon one witness' version of one meeting in February, 1978, one month after the conspiracy actually charged was shown to have been terminated by the forced landing of a plane and the arrest of three (3) co-conspirators. The substance of that witness' testimony clearly proved that if any conspiracy was in existence in February, 1978, it was most certainly not the same conspiracy charged in the indictment. To the extent that testimony tended to prove that the petitioner joined a conspiracy in February, 1978, a fatal variance existed between the indictment and the proof. As a result of that variance, this petitioner sustained substantial prejudice from the overwhelming proof, qualitatively and quantitatively, of the guilt of other defendants in the conspiratorial acts from September to December, 1977. *See United States* v. *Mardian,* 546 F.2d 973 (D.C. Cir. 1976); *United States* v. *Kelly,* 349 F.2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966). That prejudice, at the very least, mandated that the petitioner's trial should have been severed from the remaining defendants under Rule 14 of the Federal Rules of Criminal Procedure. Thus, this case falls squarely within the principles announced in *Kotteakos* v. *United States, supra.* Because of the confusion surrounding *Kotteakos* and the lower court opinions attempting to apply the principles announced therein, this Court should grant certiorari in this case to clarify this aspect of federal conspiracy law.

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[10] Admittedly, some individuals did participate in all conspiracies proved.

[11] The Government has consistently contended that the December, 1977 telephone toll records introduced against Petitioner connected him to the charged conspiracy, but no evidence was introduced as to the party or parties to such calls or the substance of conversations, if any.

4. Hearsay and Right of Confrontation

The final issue upon which review is sought involves the admissibility against petitioner of an entry in an address book seized from an alleged coconspirator *after* the termination of the conspiracy. The entry in question was the petitioner's name and business address. The alleged coconspirator was a fugitive at the time of trial and, consequently, was unavailable to testify.

Resolution of this issue involves two inquiries: First, was such evidence a hearsay declaration; second, and if it is deemed a hearsay declaration, was its admission in evidence error under Rules 801 and 802, Federal Rules of Evidence, and this Court's decision in *Krulewitch* v. *United States,* 336 U.S. 440 (1949), as well as being in violation of Petitioner's Sixth Amendment Confrontation Right, as interpreted by this Court in *Pointer* v. *Texas,* 380 U.S. 400 (1965) and *Douglas* v. *Alabama,* 380 U.S. 415 (1965).[12] Neither the Trial Court nor the Court of Appeals below reached the second inquiry, finding the entry was not a hearsay declaration,[13] although it must be conceded that it is the second inquiry which is more deserving of this Court's review by Writ of Certiorari. Petitioner nevertheless contends that a proper resolution of the hearsay, or first, inquiry compels the conclusion that the decision below is in conflict with this Court's decisions in *Krulewitch, Pointer,* and *Douglas.*

The entry in question was tantamount to a statement by an alleged coconspirator (to whom the entry was attributed without any proof that he made it) that he knew Petitioner or

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[12] Given the Court of Appeals' reliance on this evidence to support Petitioner's conviction, there can be no question of "harmless error."

[13] The Court of Appeals held that although the entry was not admitted for the truth of its contents and not hearsay, it was "circumstantial evidence as to the possible relationship between the various members of the conspiracy." (App. A, p. A-3).

that there was a relationship between himself and the Petitioner. If that was not its import, then it was not relevant; for Petitioner's business address was of no moment at trial. As such, the ineluctable conclusion is that it was a hearsay declaration.[14]

For this hearsay declaration to be admissible, the Government was required to prove, *inter alia,* that the entry was made in the course and in furtherance of the alleged conspiracy. Rule 802, Federal Rules of Evidence; *Krulewitch* v. *United States, supra.* There was no such proof, however, because the address book was seized after the conspiracy terminated, its alleged owner was unavailable at trial, and no other evidence was admitted concerning it. Its admission in evidence, therefore, was error. Given the lack of foundation and the absence of the alleged coconspirator, furthermore, Petitioner was deprived of his Sixth Amendment Confrontation Right with respect to that evidence within the meaning of *Pointer* v. *Texas, supra,* and *Douglas* v. *Alabama, supra.*

For these reasons, this Court should address both inquiries and resolve the conflict between the foregoing authority and the decision below.

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[14] A different result has been reached in such cases as *United States* v. *Ruiz,* 477 F.2d 918, 919 (2d Cir.), *cert. denied,* 414 U.S. 1004 (1973); *United States* v. *Panebianco,* 543 F.2d 447, 456 (2d Cir. 1976); *United States* v. *Day,* 591 F.2d 861, 883-85 (D.C. Cir. 1978). These rulings rest on differing and even inconsistent analyses which Petitioner submits will not withstand close scrutiny. In any event, these cases are distinguishable from the instant case because of the context in which the evidence was offerred and the Government's particular use of and reliance upon such evidence in its case against the petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED

United States Court of Appeals
For the Fourth Circuit

No. 79-5247

United States of America,
Appellee,

v.

Alan Arruda,
Appellant.

No. 80-5002

United States of America,
Appellee,

v.

Lawrence M. Rosenthal,
Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. J. Robert Martin, Jr., Chief District Judge.

Argued: August 11, 1980 Decided: September 17, 1980

Before FIELD, Senior Circuit Judge; HALL and SPROUSE, Circuit Judges.

James F. Neal (James F. Sanders, Neal and Harwell on brief) for Appellant in 80-5002; John H. Lipinski for Appellant in 79-5247; Thomas P. Simpson, Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney, William G. Rhoden, Third Year Law Student on brief) for Appellee.

PER CURIAM:

As a result of their alleged involvement in a plan to import marijuana into the United States during 1977 and 1978, Alan Arruda and Lawrence M. Rosenthal were indicted on October 10, 1978. Count I of the indictment alleged a conspiracy to import a controlled substance in violation of 21 U.S.C. §§952(a), 960, and 963; Count II alleged the substantive importation of marijuana in violation of these same statutes as well as 18 U.S.C. §2. Arruda was found guilty on both counts and received a sentence of a $15,000 fine, two consecutive five-year terms of imprisonment, and two special parole terms of two years each. Rosenthal, who was convicted under Count I but acquitted under Count II, received a sentence of a $15,000 fine, five years' confinement, and a special parole term of two years. From these convictions, Arruda and Rosenthal noted their respective appeals. After considering the record, written briefs and oral argument of counsel, we affirm the judgments of the district court, but vacate the special parole terms imposed under both conspiracy convictions.

The appellants have raised two main assignments of error: (1) the address book of an alleged coconspirator was improperly admitted into evidence, and (2) the evidence was insufficient to support the convictions. As to the first issue, appellants argue that the address book of Allen Rich, an alleged coconspirator, which was seized during his arrest in January, 1979, was inadmissible hearsay and should not have been admitted into evidence over the objection of defense counsel. The address book contained the telephone numbers and addresses of various members of the alleged conspiracy as well as other acquain-

tances of Rich. The government qualified this exhibit by introducing it only as circumstantial evidence to corroborate the existence of the conspiracy. The jury was repeatedly informed that it was not known when the entries in the book were made or by whom they were made.

We think that the address book was properly admitted as circumstantial evidence to corroborate the other evidence in the case relating to the importation conspiracy. The document was not hearsay because it was not offered to prove the truth of the matter asserted; *i.e.*, the correctness of the telephone numbers and addresses of the alleged conspirators. *See,* Rule 801(c), Federal Rules of Evidence; *Anderson* v. *United States,* 417 U.S. 211, 219 (1974). Rather, the address book was circumstantial evidence as to the possible relationship between the various members of the conspiracy as in *United States* v. *Marquez,* 424 F.2d 236 (2d Cir.), *cert. denied,* 400 U.S. 828 (1970). *Accord, United States* v. *Mejias,* 552 F.2d 435, 446 (2d Cir. 1977).

Appellants' next contention is that the uncorroborated testimony of Herman Hernandez, an unindicted coconspirator, was so inconsistent and unsubstantial that the remaining circumstantial evidence cannot sustain the convictions. Counsel relies on *United States* v. *Johnson,* 597 F.2d 654 (8th Cir. 1979), as holding that a conviction may not stand solely on the basis of the uncorroborated testimony of an accomplice where such testimony is unreliable or unsubstantial.

The government cites *United States* v. *Clark,* 541 F.2d 1016 (4th Cir. 1977), for the proposition that the uncorroborated testimony of an accomplice is sufficient to uphold a conviction. Moreover, counsel urges that the caveat in *Johnson* is not applicable to the present case because the testimony of Herman Hernandez was corroborated both by his brother Roberto's testimony as well as the circumstantial evidence. The government contends that ample authority exists in this circuit which allows a conspiracy to be proved by circumstantial evidence due to the inherently covert nature of the crime. *United States* v.

Dominguez, 604 F.2d 304 (4th Cir. 1979); *Joyner* v. *United States,* 547 F.2d 1199 (4th Cir. 1977).

We believe that the test for review as set forth in *Jackson* v. *Virginia,* 443 U.S. 307 (1979), is satisfied here in that a rational trier of fact could have found proof of guilt beyond a reasonable doubt. While the government concedes that Rosenthal proved he could not have been present in Miami to attend certain December, 1977, meetings during which arrangements were made to import marijuana, the prosecution argues that there was proof to link Rosenthal with the activities of the conspiracy during its pendency.

First, counsel points out that Rosenthal admittedly was in Miami just a few days before the date stated by Hernandez as the day of the actual meeting. The jury could reasonably have believed the substance of Hernandez's testimony regarding Rosenthal's participation in the scheme while concluding that the date given by Hernandez was incorrect. Second, the listings of telephone calls between Arruda, Rosenthal, and other members of the alleged conspiracy showed a marked increase in communications between these parties on dates immediately before, during and after those activities enumerated by Hernandez as involving either the preparation or actual importation of marijuana.

Likewise, the substance of Hernandez's testimony concerning a February 3, 1978, meeting in New York City of Rosenthal, Arruda and himself to plan future importation of marijuana was supported by other evidence. For instance, the government introduced documentary proof that Hernandez had wired $1,000 to Rich at the direction of Arruda. This money was allegedly part of the proceeds from a $15,000 check given by Rosenthal to Arruda at the February 3 meeting to finance another marijuana flight. Although the check itself could not be produced, the jury could have reasonably believed that the government's evidence relating to the meeting in New York City was the true version of

what actually transpired regarding Rosenthal's and Arruda's knowledge of and involvement in the conspiracy. Moreover, such evidence of this meeting could properly be considered by the trier of fact as substantiating the government's claim that the New York activities were merely acts done in furtherance of the conspiracy which had begun in 1977. Thus, the evidence introduced by the government, which included the address book, numerous listings of telephone calls between the alleged conspirators, the direct testimony of Herman and Robert Hernandez, and other documentary evidence, was clearly sufficient to support the convictions of both Arruda and Rosenthal.

The appellants also claim that a fatal variance existed between the charge in the indictment and the proof adduced at trial. Counsel argues that while only one conspiracy was alleged in the indictment, the evidence at trial actually showed three or four unrelated conspiracies rather than an overall plan to import marijuana into the United States. A review of the record and briefs of counsel indicates that this assertion is unfounded.

After consideration of the assignments of error by the appellants, we find them to be without merit and affirm their respective convictions. Although counsel do not challenge the special parole terms imposed for the appellants' conspiracy convictions under Count I, we must vacate each of these two-year special parole terms in light of the recent Supreme Court decision in *Bifulco* v. *United States,* 48 U.S.L.W. 4734 (June 16, 1980). In all other respects, the judgments of the district court are affirmed.

AFFIRMED IN PART AND
VACATED IN PART.

APPENDIX B

United States Court of Appeals
For the Fourth Circuit

No. 80-5002

United States of America,
Appellee,

v.

Lawrence M. Rosenthal,
Appellant.

ORDER
(Filed October 22, 1980)

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall with the concurrence of Judge Field and Judge Sprouse.

For the Court,

/s/ William K. Slate, II
Clerk